E-Systems, Inc., Garland Division *and* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW and its Local Union 848, AFL–CIO and CLC. Case 16–CA–16435

September 8, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On June 1, 1995, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, E-Systems, Inc., Garland Division, Garland, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Edward Valverde, Esq., for the General Counsel.
Neil Martin, and *Randall J. White, Esqs. (Gardere & Wynne)*, of Houston and Dallas, Texas, respectively, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried at Fort Worth, Texas, on May 24 and 25, 1994. The charge was filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local Union 848, AFL–CIO and CLC (the Charging Party or Union) on December 13, 1993,[1] against E-Systems, Inc., Garland Division (Respondent). On March 14, the Regional Director for Region 16 of the National Labor Relations Board issued a complaint and notice of hearing, as amended, alleging Respondent has failed and refused, and continues to fail and refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the National Labor Relations Act.

Specifically, the issue is whether Respondent unlawfully and unilaterally altered a newly negotiated collective-bargaining agreement, without notice, by changing the language ratified by the unit from: ''As the corporation modified the corp[orate] plan, the Division plan will also be modified'' to: ''As the corporation modifies the Corporate Medical Plan, the Bargaining Unit Medical Plan will also be modified. The Company will communicate such changes in writing to the Union.''

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent claims the Union agreed to the provision in the collective-bargaining agreement and, if it is determined there was an unlawful unilateral change, the Union clearly and unmistakably waived its right to protest Respondent's unilateral change in the health benefit provision. Respondent also claims if there is merit to the Union's position, then there was no meeting of the minds; therefore, there is no collective-bargaining agreement. Respondent's motion to dismiss the complaint is denied for the reasons stated here.

All parties were given full opportunity to appeal, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, including my observation of the demeanor of the witnesses, and having considered the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Based on Respondent's answer to the complaint, I find it meets one of the Board's jurisdictional standards and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a statutory labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent[2] and the Union had an established collective-bargaining relationship and commenced negotiations for a successor agreement in January 1993. They agreed to initially negotiate the noneconomic items. Preparatory to the negotiations, in recognition of the ''adversarial'' relationship between the Company and the Union, Respondent arranged for the Federal Mediation and Conciliation Service to instruct the company and union negotiating committees in a joint training session on ''win/win negotiations . . . which included how to arguments, how to discuss topics without being challenging and threatening, and how to obtain consensus.''

[1] All dates are in 1993 unless otherwise indicated.

[2] As here pertinent, Respondent refers solely to E-Systems, Inc.'s Garland Division unless otherwise indicated.

E-Systems has approximately 15,000 employees nationwide, of which 5000 work at the Garland Division. There are two unions at the Garland facility, one which represents about 33 plant guards, and the Charging Party, which represents between 500 and 600 employees.[3] Except for the employees represented by the Charging Party, almost all of Respondent's employees nationwide were under the same health plan which Respondent initiated in January 1991.

For ease and economy of operation, Respondent determined to have all of its employees under the same health insurance plan. When negotiations for a new collective-bargaining agreement commenced, the unit represented by the Charging Party had the option of two health plans. Respondent made the incorporation of the Charging Party's unit into the same health plan as all its other employees one of its four key goals in the negotiations.

Respondent's bargaining committee included Director of Personnel and Organization Gary L. McDonald,[4] Manager of Personnel and Organization John W. Bell, Human Resources Administrator Carl Cox, and Supervisor of Employee Benefits and Records Sharon Camp. The Union's initial bargaining committee included International Representative Darryl Greer for the Union, and an elected bargaining committee. At the commencement and for most of the negotiations, the elected bargaining committee members were employees R.L. Biggerstaff, Ken Tuggle, Regina Wynne, Tom Hubbard, David Carpenter, and Linda Newton (former committee). On or about May 16, a new committee was sworn in for the Union which included Brent Wimsatt, David Berrera, John Podsednik, Adriana Sloan, and David Dennis. Greer was still the international representative. With the exception of Greer, none of the Union's new negotiating team had any experience negotiating collective-bargaining agreements.

B. *Negotiations and Ratification*

At or near the beginning of the first negotiating session, Greer read a statement of the Union's concerns which clearly related all agreements reached during the negotiations that were considered tentative pending the conclusion of negotiations and ratification ''by the members of UAW Local 848, E-Systems unit.'' The Union presented Respondent with only its ''non-economic concerns'' at this initial meeting. The matters agreed on during negotiations were typed by Respondent and presented at the negotiating sessions for execution. Those few times the typed version of the understanding did not accurately reflect the parties' understanding, it was retyped. The new typed version of the understanding was then signed by the negotiators, and ''each side was given copies to keep in keeping with the first page of the contract with the understanding that they were tentative agreements'' subject to ratification by the union members.

On February 4, Respondent presented its health benefit proposal to the Union. The plan will be referred to as the CIGNA plan. Initially, Camp went through Respondent's written proposal, which was distributed to all attendees, with the assistance of an overhead projector. The proposed health plan was the same as was in effect for all of Respondent's employees save those represented by the Union. On page 27 of Respondent's proposal, entitled ''Terms,'' the last sentence read: ''AS THE CORPORATION MODIFIED THE CORP PLAN, THE DIVISION PLAN WILL ALSO BE MODIFIED.''

The discussions concerning this part of Respondent's proposal is a matter of dispute. According to Greer, after Camp's presentation, he and McDonald discussed the level of benefits and the cost to unit members. McDonald proposed the employees pay half of all costs. Greer claims to have told McDonald ''that we were not going to agree to continue to pay half of the increases because we had a grievance on file on that time.''[5] At no time was the written proposal altered during negotiations, and Respondent did not propose any other plan as an alternative, prior to ratification. The Union understood the cost was fixed and increases were set in accordance with a schedule of employee contributions. The schedule was established as of August 1 with fixed increases to be implemented on January 1, 1994, and January 1, 1995.[6]

At the February 4 meeting, it was agreed the Respondent would have representatives of the health plan present to answer questions. At the meeting with the health plan representatives, the union negotiating team also received the actual schedule of benefits, which the Union and Respondent agreed on and signed. The schedule was the same as referenced in footnote 6 of this decision. Shortly thereafter, the Union and Respondent reached tentative agreement on a collective-bargaining agreement, and the Union presented Respondent's benefits proposal and the other typewritten and executed understandings to the membership for ratification.

To assist in the ratification process, Respondent drafted and provided to all hourly employees a letter dated March 15, called the ''Company's Best and Final Offer—UAW.'' The description of the health plan stated the purpose of the plan to ''[p]rovide a level of HMS benefits consistent with the CIGNA Managed Care Program effective June 1, 1993.'' On page 3 of this missive, Respondent detailed the unit employees' weekly contributions, which were set, and for the

[3] The appropriate unit is:

INCLUDED: All production, maintenance, and powerhouse employees, inspectors and leadmen and any other employees in the classifications covered by Appendix A, at the Garland Division of E-Systems, located at 1200 Jupiter Road, Garland, Texas.

EXCLUDED: All office clerical employees, administrative employees, timekeepers and all employees in Employee Relations, medical, Industrial Security, and Engineering Departments, and supervision as defined in Section 2(11) of the National Labor Relations Act, as amended, or any other employees not in the classifications covered under Appendix A.

[4] McDonald was Respondent's chief negotiator and spokesman.

[5] McDonald testified:

Q. Was there any suggestion made by Mr. Greer during the course of the negotiations that he wanted the employees' contribution level to be regulated and fixed by agreement?

A. Yes, there was.

Similarly, Camp testified:

Q. Were you present at any meeting where the union took the position that it did not want the rates to employees to change during the term of the new collective bargaining agreement?

A. I remember some discussion of that back early on because there was a lot of discussion on rates back in the very beginning where they—I believe that was their stand.

[6] See G.C. Exh. 7, p. 72, section entitled, ''Contributions'' which provided: ''Effective 1 August 1993, employee contributions for the Managed Care and Out-of-Area Plans are as follows'' and a discrete fixed schedule of increases was incorporated in this section.

same amounts and intervals provided in the above-referenced schedule in the General Counsel's Exhibit 7, page 72. This March 15 letter did not contain any reference to additional increases in costs to unit members if there were alterations in the CIGNA plan companywide or divisionwide.

The union members failed to ratify the new collective-bargaining agreement. The Union and Respondent continued negotiations, but the health plan was not the subject of further negotiations. Only those matters which caused the failed ratification were the subjects of continued bargaining. These issues included, according to Greer's and Wimsatt's unrefuted testimony: cross-training employees, ''grandfathering'' of employees, ''combining some labor grades and classifications, rates of pays [sic], contributions on the insurance, and there may have been one other economic issue.'' Near the end of the negotiation process, the new negotiating representatives took over bargaining for the Union with Respondent. Greer remained a member of the Union's negotiating committee. It is undisputed the CIGNA plan was not a subject of the negotiations with the new union team. The new committee attended just two negotiation sessions.

A tentative agreement was reached on or about May 24, and a ratification vote was conducted the next day. Respondent printed copies of the tentative agreement for presentation to the union members at the ratification vote. The collective-bargaining agreement was ratified on May 25. Consonant with past practice, Respondent agreed to publish the collective-bargaining agreement using the previously agreed to terms and conditions. Bell was given the responsibility for preparing the document under McDonald's supervision.

Respondent admits its benefits proposal, as presented to the Union February 4, included the statement, ''as the corporation modified the corp plan, the Division plan will also be modified.''[7] Respondent claims Camp, when she was explaining the health plan on March 4, ''made a statement, and I said, 'This means that all future changes to the mother plan or the corporate plan—we refer to it as the mother plan—would also affect your plan.''' The record does not clearly demonstrate Camp was present at any and all subsequent meetings where this subject was discussed. Respondent's witnesses, McDonald, Bell, and Cox, corroborated Camp. Greer did not refute Camp made this statement, however, the issue is what the parties agreed to during their negotiations. It is clear the Respondent wanted to pass on some of the costs of any increases in the health care plan to employees, and the Union wanted such increases and any other changes scheduled in the agreement so the unit employees would know their health benefits and obligations for the life of the agreement.

Respondent circulated to union members for the last ratification vote the benefits package presented to the Union on February 4, and a precise list of benefits, including a notation, ''medical 08-01-93 rates for M/C & O/A.'' The contributions detailed in the General Counsel's Exhibit 7 and Respondent's letter to union members as the ''last and best offer'' contained contribution schedules commencing on August 8 and increasing to a specified amount the first of the next 2 years. These documents fail to provide for any other increases in unit members' contributions. There was no claim Respondent and the Union failed to agree on the quoted February 4 language. There is a dispute as to what the February 4 language meant. Greer claimed he and McDonald had agreed the unit employees would pay the amounts stated on page 72 of the agreement, the General Counsel's Exhibit 7.[8]

After ratification of the agreement, Bell commenced preparing both an interim and final form of the collective-bargaining agreement. Pursuant to McDonald's suggestions, Bell changed the verbiage of the Respondent's proposals presented to the Union during negotiations and in the letter entitled, ''Last and Final Offer'' dated March 25 from ''As the corporation modified the corp[orate] plan, the Division plan will also be modified'' to ''As the corporation modifies the Corporate Medical Plan, the Bargaining Unit Medical Plan will also be modified. The Company will communicate such changes in writing to the Union.''

While the Union's new negotiating committee received both the interim and final copies of the written collective-bargaining agreement, they claim, by Greer, Berrera, and Wimsatt, to have not read the documents in their entirety and to have not noticed the alteration in language until Respondent sent them written notification by letter dated October 8 that changes to the CIGNA plan would become effective January 1, 1994. It is undisputed the specific language incorporated into the interim and final drafts of the collective-bargaining agreement was not presented to any union negotiating committee during negotiations, and it was not presented to the Union in the materials supplied by Respondent to assist in the ratification process. It is also undisputed the changes contained in the October 8 letter were different from the schedules contained in the March 25 letter and the General Counsel's Exhibit 7, page 72; and there is a disagreement about what the parties agreed to during negotiations

[7] Respondent also does not dispute the documents provided to the Union during negotiations and ratification was limited to the February 4 language and schedule of increases such as that provided in the March 15 letter. There was no written and executed memorandum of text similar to that inserted by Respondent in the interim and written versions of the collective-bargaining agreement. There was no explicit writing indicating benefits could be altered during the term of the collective-bargaining agreement without bargaining with the Union. Respondent notes it does not know what the Union presented to its membership for ratification. This argument is not persuasive. The record demonstrates the only verbiage the Union had at the time of ratification was that prepared by Respondent during negotiations. McDonald admitted the new disputed language was not inserted into the collective-bargaining agreement until he suggested to Bell Respondent make those alterations when the written agreement was being prepared by Respondent; postratification. Therefore, the union members could not have ratified the modification here under consideration.

[8] Greer's unrefuted testimony was Respondent prepared additional materials for the Union to circulate to its members for the ratification vote. According to Greer:

> There were a number of other documents attached to this that were passed out as it relates to the lump sum payments, what percent they were going to be, and what each employee was going to pay on their insurance each year of the agreement.
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> That was reproduced for us by the company, also and attached to this [G.C. Exh. 7] to cover any discrepancies. This was what we had changed in the language as it relates to the Company wanting us to have this bottom star paragraph you are talking about and pay more money or having some open ended thing. Respondent's last and best offer to the union membership circulated by Respondent prior to the ratification vote supports Greer's testimony.

concerning when health benefits may be modified, if at all, during the life of the collective-bargaining agreement.

Respondent asserts the verbiage presented to the old union negotiating committee, and its March 25 communication with employees, was clearly understood by the Union to mean that as Respondent altered the CIGNA plan companywide, the benefits for the employees represented by the Union would be similarly modified, without any additional negotiations. In support of this argument, Respondent refers to a March 23 letter from Greer to McDonald which provided:

> We have never said that any one issue would prevent us from completing in negotiations. We have stated to you that we feel your overall offer seems to be of little value and have asked you to give us an economic analysis of the cost of your proposal. You have refused to do that. The Union is very concerned abut the issue of health care and the employee contribution toward that cost. Whenever we have attempted to bargain over health care coverage, you have repeatedly stated that it is corporate policy to eliminate all the options and implement CIGNA. When we have attempted to bargain about employees who are not now making contributions to the health care program having to do so under your plan, you continually state that this is a corporate decision. One would be hard pressed to justify the company's continually referring to corporate decisions as bargaining in good faith.

Greer included in this letter a request for information concerning the operation of the plan. There was no specific reference to when and how changes in unit employee contributions would go into effect; whether, according to the schedule in Respondent's March 25 letter and the General Counsel's Exhibit 7 or after written notification by Respondent in accordance with what it claims was the agreement; i.e., when the Company altered the corporatewide plan the unit employees' plan would also be altered and the employees in the unit would have to pay part of any increased costs on a basis other than that provided in General Counsel's Exhibit 7 and Respondent's letter to union members dated March 25. I therefore find this argument by Respondent to be unpersuasive.

Respondent claims the union representatives had an obligation to review and correct the interim and final versions of the collective-bargaining agreement, and their failures constitute waivers of their right to contest the contract language. Respondent also argues the Union executed the final version of the collective-bargaining agreement after being afforded ample opportunity to review its contents, and their failure to object to the above-described revisions in verbiage should be construed as a manifestation of their approval of the agreement. The claims of Greer, Wimsatt, and Berrera that they had not read the draft and final collective-bargaining agreements prepared by Respondent should be rejected as an ''ostrich defense.''[9]

[9] Respondent requests I draw an adverse inference based on the failure of counsel for General Counsel to present any of the old negotiating committee members. I find such an inference is not warranted in this case. Greer testified, without contradiction, the parties agreed to adopt the language presented by Respondent on February 4. There was no need to present any old committee members to corroborate Greer's testimony.

Additionally, Respondent avers if these defenses fail, then the record clearly established there was no meeting of the minds; thus, there was no collective-bargaining agreement. According to Respondent, General Counsel has failed to establish the Union and Company had reached agreement ''on all substantive issues and material terms of the contract.'' *Intermountain Rural Electric Assn.*, 309 NLRB 1189 (1992).

Analysis and Conclusions

Initially, I find this is not an issue of meeting of the minds. The parties agreed to verbiage during and in the course of negotiations, and the Respondent supplied the Union with the same verbiage, consonant with past practice, to be circulated to members for the condition precedent ratification. Respondent unilaterally altered the agreed-on verbiage. Respondent did not make an inadvertent mistake, it knowingly meant to alter agreed-on terms of the agreement. This is not a case where a message was garbled; no message was given. Compare *Colfax Envelope Corp. v. Local 458–3M*, 20 F.3d 750 (7th Cir. 1994). Here, there was a meeting of the minds that the Union agreed to the CIGNA plan and the specific provision ''As the corporation modified the corp[orate] plan, the Division plan will also be modified.'' Therefore, there is a contract for an arbitrator to interpret. Id. at 757.

To constitute an effective waiver of statutory bargaining rights, the Union's actions must be ''clear and unmistakable.'' *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). ''Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.'' *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). Here, there was no express agreement in the collective-bargaining agreement so the parties' conduct is dispositive of the issue.

Assuming, arguendo, Respondent is correct and there was no meeting of the minds, and thus no collective-bargaining agreement, then there would be no waiver by the Union since there was no demonstration of a clear and knowledgeable understanding by union representatives that execution of the contract would waive their right to object to any unnoticed and/or unknown changes in the wording of the agreement; which all parties acknowledge was the wording agreed on, in Respondent's benefits proposal of February 4.

I credit Wimsatt, Greer, and Berrera that their cursory review did not catch the change in verbiage inserted by Bell at McDonald's suggestion. They appeared forthright and candid when they testified they did not read the entire interim and/or final versions of the collective-bargaining agreement prior to or during the signing ceremony. I also credit their testimony they did not discover the alteration until prompted by Respondent's October 8 letter informing the Union of the postagreement changes to the CIGNA plan. The Union's behavior, although lax, did not amount to conduct, either standing alone or in concert with any other factors, which constituted a clear and unmistakable intent to waive any pertinent rights. *Road Sprinkler Fitters Local 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982); *Florida Steel Corp. v.*

NLRB, 601 F.2d 125, 129–130 (4th Cir. 1979); and *NLRB v. R.L. Sweet Lumber Co*., 515 F.2d 785, 795 (10th Cir. 1975), cert. denied 423 U.S. 986 (1975). The union representatives' actions were consonant with their proposals at the commencement of negotiations. As the cover sheet to the Union's proposal, which was read to Respondent at the commencement of bargaining for the current collective-bargaining agreement, the Union proposed:

> It is the Union's intention to utilize the win-win method of bargaining to secure a new agreement . . . UAW Local 848 is interested in bargaining for a complete agreement and suggest that all understandings and previous agreements, both oral and written, that are not specifically modified, altered, or amended during negotiations shall remain in full force and effect for the life of the agreement. Any agreements during these negotiations are to be considered tentative pending the conclusion of negotiations and a ratification vote by the members.

Respondent did not refute the testimony the negotiations complied with this union suggestion. Negotiations terminated with ratification and were not reopened by Respondent. When the union members ratified the terms agreed on by the negotiating committees, a collective-bargaining agreement came into existence. The parties' established practice of having the Respondent reduce the agreement to writing in no way vitiated or altered the verbal agreement. *Central Plumbing Co*., 198 NLRB 925, 929 (1972).

There is no basis to find the Union had an opportunity to request bargaining about the unilateral alteration in the collective-bargaining agreement or knowingly failed, without excuse, to request bargaining about the change. The Union had ratified the CIGNA proposal and, in accordance with the understanding, there would be no changes in the parties' past practice of Respondent preparing the written contract encompassing ratified agreements. Respondent did not give the Union clear and timely notice of the alteration in the draft and final versions of the collective-bargaining agreement. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981). There must be a clear showing a party consciously yielded its statutory right. *McDonnell Douglas Corp*., 224 NLRB 881 (1976). There is no such showing in this case.[10]

I find the credited testimony clearly establishes the Union was not aware of the change prior to executing the contract and immediately upon determining there had been a change, protested to Respondent. Thus, there could be no ''clear and unmistakable'' waiver by the Union. I also find the unilateral change of the unit members health benefits without notification and bargaining could be and, in these circumstances, is a violation of Respondent's duty to bargain under Section 8(a)(5) and (1) of the Act. *Technicolor Government Services v. NLRB*, 739 F.2d 323, 327 (8th Cir. 1984); *A-1 Fire Protection*, 273 NLRB 964 (1984).

As held in *Joey's Stables*, 279 NLRB 728, 738 (1986):

> Under most circumstances, an employer may not change the insurance coverage it provides its unionized employees without giving prior notice to the union and, if requested by the union, bargaining about the proposed change. E.g., *Rose Abor Manor*, 242 NLRB 795 (1979). The fact that no collective-bargaining agreement was in effect at the time Respondent made the change did not relieve the Respondent of the duty to notify and bargain with the Union about the change. *NLRB v. Williamsburg Steel Products*, 369 U.S. 736 (1962); *Southwest Security Equipment Corp*., 262 NLRB 665 (1982), enfd. 736 F.2d 1332 (9th Cir. 1984).[11]
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> . . . .
>
> *Waiver*. Respondent points out that even though the Union knew as early as 1 August that Respondent had ended the group insurance, ''no representative of the charging party *ever requested Respondent to bargain over the matter*, protested, or requested Respondent to [undo] what it had done.''
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> It is true a union may waive its right to bargain about a change in terms of employment; and it is also true that in some circumstances a failure by a union to protest may be deemed a waiver. E.g., *Merillat Industries*, 252 NLRB 784, 785–786 (1980). But when an employer acts without first notifying the union, the union's subsequent silence does not amount to a waiver of its right to bargain. *Peat Mfg. Co*., 261 NLRB 240 fn. 2 (1982).

Clearly, the alteration was not the result of a failure to reach agreement. If there is any failure, it is not what the parties agreed to; rather, it may be what the agreement means. The meaning of the phrase ''As the corporation modified the corp[orate] plan, the Division plan will also be modified'' was interpreted differently by the parties at hearing. As the Board held in *NCR Corp*., 271 NLRB 1212, 1213 (1984):

> The Board is not compelled to endorse either of these two equally plausible interpretations of the contract's operation in this case. The present dispute is solely one of contract interpretation. As the Board has stated in *Vickers, Inc*., 153 NLRB 561, 570 (1965), when ''an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,'' the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct. [Citing *Timkin Roller Bearing Co. v. NLRB*, 161 F.2d 949, 955 (6th Cir. 1947); *Consolidated Aircraft Corp*., 47 NLRB 694, 706 (1943), enfd. 141 F.2d 785 (9th Cir. 1944); and *Na-*

[10] There is some evidence the parties had a practice of making some verbal agreements and not incorporating such agreements into the collective-bargaining agreement. Whether there was such a practice is not dispositive of any of the issues here under consideration.

[11] Assuming, arguendo, Respondent is correct and there was no meeting of the minds, then Respondent would be obligated to notify and bargain with the Union about any changes in their health benefits, actions Respondent admittedly did not take. However, since I have concluded there is a collective-bargaining agreement, I do not find Respondent violated the Act by changing health insurance coverage without meeting this duty to notify and bargain with the Union about the change in the absence of a collective-bargaining agreement.

tional Diary Products Corp., 126 NLRB 434, 439 (1960).]

Unlike the employer in *NCR Corp*., Respondent did not clearly and expressly inform the Union it was altering the verbiage from the agreement reached during negotiations, and its last and best offer, which the Union relied on in reaching agreement and in seeking the condition precedent ratification. This is not a case where the language contained in the draft and final contracts prepared by Respondent contained any discrepancies which may be traced to ambiguity for which neither party is to blame. Respondent understood which language was the agreed-on verbiage. The parties' accord on the wording was mutual and spoken; the February 4 language was accepted. The document presented by Respondent for ratification included the agreed-on sentence. The postagreement change by Respondent was specifically and unilaterally inserted by Respondent without consultation with the Union concerning any potential changes in meaning and to preclude the Union from pressing the objections raised in this proceeding.[12]

McDonald admitted the sentence in the changed version, that the Company would relate any changes in the plan to the Union in writing, was not discussed during negotiations. The other change to the agreement dealing with written notification of the Union was clearly not discussed during negotiations. There was not clear and convincing evidence the parties contemplated any changes in wording during the preparation of the interim and final written versions of the collective-bargaining agreement. There was a meeting of the minds in a formal sense on the language to be used in the Union's agreement to come under the CIGNA health plan. This is not a question of mistake; it was an intentional alteration. Respondent changed the accepted wording knowing it was not in conformity with the actual written verbiage accepted by the Union. McDonald, as noted above, admitted at least part of the change was not even the subject of bargaining.

Respondent did not withdraw the language submitted to the Union on February 4. At no time was the Union expressly informed there was an alteration in the terms it was negotiating during bargaining. The record unquestionably establishes the changes were made by Respondent without consultation with the Union after ratification of the agreement. This alteration was not due to any failure to reach agreement or resistance on the part of the Union, it was the result of Respondent's own cognizable actions. The Restatement, *Contracts*, § 504 (1932), states:

> [W]here both parties have an identical intention as to the terms to be embodied in a proposed . . . contract . . . and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties.

As the Board noted in *Americana Healthcare Center*, 273 NLRB 1728, 1733 (1985), where the Board adopted the following observation by the administrative law judge:

> [W]here a written agreement is not in conformity with the actual intention of the parties, a court of equity will reform the writing in accordance with that intention.

To find otherwise would permit one party to defeat a clear accord on written language under the flag of clarifying the understanding after ratification. The party who voluntarily prepares the written collective-bargaining agreement has a duty under the Act to incorporate any agreement reached. The acceptance by the Union of the language proposed by Respondent on February 4 imposed a duty to incorporate that exact wording accepted during negotiations and ratified by the Union's members. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (1941).[13]

Accordingly, Respondent's postratification alteration of the agreed-on language, without expressly withdrawing such language in its offer, is a unilateral change in the terms and conditions of employment; and Respondent has failed and refused to bargain collectively with the exclusive representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act. I have also concluded for previously stated reasons Respondent's affirmative defenses of waiver and no meeting of the minds are without merit. If there is any question of interpretation of the agreed-on wording of the agreement, it is best left to arbitration. *NCR Corp*., supra at 1213.

CONCLUSIONS OF LAW

1. The Respondent, E-Systems, Inc., Garland Division, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local Union 848, AFL–CIO and CLC (Union) are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(b) of the Act for the following appropriate unit:

> INCLUDED: All production, maintenance, and powerhouse employees, inspectors and leadmen and any other employees in the classifications covered by Appendix A, at the Garland Division of E-Systems, located at 1200 Jupiter Road, Garland, Texas.

[12] As found in *Lozano Enterprises v. NLRB*, 327 F.2d 814, 818 (9th Cir. 1964):

> . . . in deciding whether, under a particular set of circumstances, an employer and a union have in fact arrived at an agreement that the employer is then obligated to embody in a written contract upon the union's request, the Board is [not] strictly bound by the technical rules of contract law.

Rather, a more crucial inquiry is whether the two sides have reached an ''agreement,'' even though that ''agreement'' might fall short of the technical requirements of an accepted contract. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976), cert. denied 429 U.S. 895 (1976).

[13] As the court noted in *Lozano Enterprises v. NLRB*, 327 F.2d 814, 819 (1964): ''[t]o permit an employer to do what this employer did would encourage results directly contrary to the purposes of the Act.'' (See *NLRB v. Howell Chevrolet Co*., 204 F.2d 29 (9th Cir. 1953), affd. 346 U.S. 482 (1953); and *NLRB v. Parma Water Lifter Co*., 211 F.2d 258, 263 (9th Cir. 1954).)

EXCLUDED: All office clerical employees, administrative employees, timekeepers and all employees in Employee Relations, medical, Industrial Security, and Engineering Departments, and supervision as defined in Section 2(11) of the National Labor Relations Act, as amended, or any other employees not in the classifications covered under Appendix A.

4. At all times material, the Union has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 3 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its above-described employees within the meaning of Section 8(d) of the Act by unilaterally changing the wording of the health benefits provision in the collective-bargaining agreement, Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

6. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Employer has engaged in unfair labor practices proscribed by Section 8(a)(5) and (1) and Section 8(d) of the Act, I recommend that it cease and desist therefrom, and that it take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the Act.

I further find that, as part of the appropriate remedy, Respondent be ordered to reinstate the health benefits language the parties agreed upon and the union members ratified, i.e., substitute in and make part of the written collective-bargaining agreement the following: ''As the Corporation modified the Corporate Medical Plan, the Division Medical Plan will also be modified.'' *Americana Healthcare Center*, supra at 1728. Respondent shall notify the Union this change has been made in the collective-bargaining agreement.

In accord with *NCR Corp*., supra at 1213, any dispute concerning the meaning of ''As the Corporation modified the Corporate Medical Plan, the Division Medical Plan will also be modified'' should be resolved by resort to the agreement's grievance procedures. Therefore, the Charging Party shall be granted, from the time the Union receives notification in writing of Respondent's compliance with the recommended Order, the contractually designated time to file a grievance as to the meaning of this sentence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, E-Systems, Inc., Garland Division, Garland, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW and its Local Union 848, AFL–CIO and CLC, as the exclusive representatives of all the employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, composed of:

INCLUDED: All production, maintenance, and powerhouse employees, inspectors and leadmen and any other employees in the classifications covered by Appendix A, at the Garland Division of E-Systems, located at 1200 Jupiter Road, Garland, Texas.

EXCLUDED: All office clerical employees, administrative employees, timekeepers and all employees in Employee Relations, medical, Industrial Security, and Engineering Departments, and supervision as defined in Section 2(11) of the National Labor Relations Act, as amended, or any other employees not in the classifications covered under the Appendix A.

(b) Unilaterally changing terms and conditions of employment without first affording the Union the opportunity to bargain over the proposed changes, including modifying postratification, without notice and/or opportunity to bargain, wording agreed on in negotiations when preparing the written agreement for execution by the parties.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the health benefits language the parties agreed on during collective bargaining and the union members ratified, by substituting in and making part of the written collective-bargaining agreement the following: ''As the Corporation modified the Corporate Medical Plan, the Division Medical Plan will also be modified.'' Respondent shall delete from the collective-bargaining agreement the language it unilaterally inserted as follows: ''As the Corporation modifies the Corporate Medical Plan, the Bargaining Unit Medical Plan will also be modified. The Company will communicate such changes in writing to the Union.'' The Respondent shall notify the Union of this change has been made in the collective-bargaining agreement.

(b) If any dispute exist concerning the meaning or application of the agreed-upon language: ''As the Corporation modified the Corporate Medical Plan, the Division Medical Plan will also be modified'' the Charging Party shall be granted, from the time it receives written notification of Respondent's compliance with this recommended Order to effect the substitution of wording, the contractually designated time to file a grievance as to the meaning of this sentence as provided in the remedy.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at its facility and place of business in Garland, Texas, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain collectively and in good faith with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment with International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America UAW, and its Local Union 848, AFL–CIO and CLC, as the exclusive bargaining representative of the employees in the unit described below, by unilaterally changing terms and conditions of employment by altering postratification, agreed-on wording concerning health benefits, when preparing the written agreement for execution by the parties. The appropriate unit is:

> INCLUDED: All production, maintenance, and powerhouse employees, inspectors and leadmen and any other employees in the classifications covered by Appendix A, at the Garland Division of E-Systems, located at 1200 Jupiter Road, Garland, Texas.
>
> EXCLUDED: All office clerical employees, administrative employees, timekeepers and all employees in Employee Relations, medical, Industrial Security, and Engineering Departments, and supervision as defined in Section 2(11) of the National Labor Relations Act, as amended, or any other employees not in the classifications covered under Appendix A.

WE WILL afford the Union the opportunity to resolve any dispute concerning the interpretation of the agreed-upon language: ''As the Corporation modified the Corporate Medical Plan, the Division Medical Plan will also be modified'' by resort to the collective-bargaining agreement grievance procedures by granting the Union the contractually designated time to file a grievance as to the meaning of this sentence as of the date the Union is notified in writing we have reinstated this language in the collective-bargaining agreement.

WE WILL reinstate and incorporate in the collective-bargaining agreement the agreed-on language ''As the Corporation modified the Corporate Medical Plan, the Division Medical Plan will also be modified.'' WE WILL also delete from the agreement the language we unilaterally inserted as follows: ''As the Corporation modifies the Corporate Medical Plan, the Bargaining Unit Medical Plan will also be modified.'' The Company will communicate such changes in writing to the Union.

E-SYSTEMS, INC., GARLAND DIVISION